UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

- - -

THE ANTIOCH COMPANY LITIGATION TRUST, : CIVIL CASE NO. 3:10cv156

Plaintiff, : Cincinnati, Ohio

vs. : Tuesday, April 1, 2014

: 9:00 a.m.

LEE MORGAN, et al., :

: **MOTION TO EXCLUDE PLAINTIFF'S**

Defendants. : **EXPERT WITNESS**

- - -

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE TIMOTHY S. BLACK, JUDGE

- - -

APPEARANCES:

For the Plaintiff:
MARCIA VOORHIS ANDREW, ESQ.
TIMOTHY MILLER, ESQ.
Taft Stettinius & Hollister
425 Walnut Street, Suite 1800
Cincinnati, OH 45202

For the Morgan Defendants:
MICHAEL L. SCHEIER, ESQ.
BRIAN MUETHING, ESQ.
DANIELLE D'ADDESA, ESQ.
Keating Muething & Klekamp
One East Fourth Street
Suite 1400
Cincinnati, OH 45202

For McDermott Will and Emery:
JEFFREY S. SHARKEY, ESQ.
Faruki Ireland & Cox PLL
500 Courthouse Plaza, SW
10 N Ludlow Street
Dayton, OH 45402

Proceedings reported by stenotype.
Transcript produced by computer-aided transcription.

For James Northrup:
R. DANIEL PRENTISS, ESQ.
R. Daniel Prentiss, P.C.
One Turks Head Place
Suite 380
Providence, RI 02903

For Nancy Blair and Wayne Luce:
DANIEL J. GENTRY, ESQ.
TERENCE L. FAGUE, ESQ.
Coolidge Wall Co., L.P.A.
33 West First Street
Suite 600
Dayton, OH 45402

For Officer Defendants:
ROBERT A. KLINGLER, ESQ.
525 Vine Street, Suite 2320
Cincinnati, OH 45202

For Jeanine McLaughlin, Dennis Sanan and Malte Von Matthiessen:
THOMAS A. KNOTH, ESQ.
JENNIFER MAFFETT, ESQ.
Thompson Hine
Austin Landing I
10050 Innovation Drive
Suite 400
Dayton, OH 45342

Courtroom Deputy: Mary Rogers

Court Reporter: Jodie D. Perkins, RMR, CRR

AFTERNOON SESSION, Tuesday, April 1, 2014

(Proceedings commenced at 4 o'clock p.m.)

THE COURT: Good afternoon, ladies and gentlemen. Here in the open courtroom on the record, Judge Barrett was kind enough to make his courtroom available, in large part because of the technology. I understand we have some lawyers appearing by phone and that works in this courtroom.

We're here on the motion of the Morgan defendants to exclude plaintiff's expert report opinions and testimony. I would like the attorneys who are in the courtroom and will be arguing to enter their appearance for the record, tell me who is here with you. And then I am going to identify who is on the phone, and then we will proceed to argument.

So on behalf of the movant, the Morgan defendants, Counsel?

MR. SCHEIER: Good afternoon, Your Honor. Michael Scheier, of Keating Muething and Klekamp, on behalf of Lee Morgan, Marty Moran and several Morgan family-related trusts, along with my law partner Brian Muething.

THE COURT: Good afternoon, gentlemen.

And on behalf of the plaintiff, Antioch Company Litigation Trust?

MS. ANDREW: Good afternoon, Your Honor. Marcia Andrew with the Taft firm, on behalf of Antioch Company Litigation Trust. I have with me today Timothy Miller, my

partner, who is the trustee of the Trust.

THE COURT: Good afternoon to the both of you as well.

The phone is on, Ms. Rogers; is that right?

THE COURTROOM DEPUTY: Yes, Your Honor.

THE COURT: And is it transmitting through the microphone I'm speaking with?

THE COURTROOM DEPUTY: I believe so.

THE COURT: Very well. Who do we have on the telephone on behalf of whom?

MR. SHARKEY: Your Honor, this is Jeff Sharkey on behalf of McDermott Will and Emery, and we can hear you very clearly over the telephone. Thank you for the courtesy of having the phone available.

THE COURT: Very well.

MR. PRENTISS: Dan Prentiss, Your Honor, on behalf of defendant James Northrup.

THE COURT: Very well. Good afternoon.

MR. PRENTISS: Good afternoon, sir.

THE COURT: Do we have further counsel on the line who have not identified themselves?

MS. D'ADDESA: Danielle D'Addesa, on behalf of the Morgan defendants.

THE COURT: Good afternoon, Counsel. You're keeping an eye via telephone on Mr. Muething and Scheier; is that right?

MS. D'ADDESA: That is correct.

THE COURT: Very well. Do we have others in the courtroom who represent parties who wish to identify themselves for me?

MR. FAGUE: Your Honor, Terence Fague and Dan Gentry, on behalf of defendants Nancy Blair and Wayne Alan Luce.

THE COURT: Good afternoon.

MR. KNOTH: Your Honor, Tom Knoth and Jennifer Maffett, on behalf of Jeanine McLaughlin, Dennis Sanan and Malte Von Matthiessen.

THE COURT: Very well. Good afternoon.

MR. KLINGLER: Your Honor, Bob Klingler on behalf of the officer defendants.

THE COURT: Good afternoon, Mr. Klingler.

Are there others who wish to identify themselves?

(No response.)

THE COURT: The other three decline at this time because they're not attorneys of record?

(No response.)

THE COURT: They appear to be especially silent. Welcome to the courtroom.

Well, we're going to hear oral argument and it is on one motion. I am going to hear from the movant first and last. I am going to hear from Antioch in between. I've read the pleadings and they have drawn my attention.

So who wishes to be heard on behalf of the movant?

MR. SCHEIER: I would like to be heard, Your Honor.

THE COURT: Very well. And then are you prepared to negotiate how much time you intend to consume?

MR. SCHEIER: I will consume as much time as Your Honor allows me. If you have in mind an amount of time that you would like for argument, I would be happy to negotiate with you and with Ms. Andrew. I can tell you that I believe if I'm -- if the argument goes just with me talking, it could be about, I would say twenty minutes or so. I'll put in the proviso that typically I undershoot my estimations by -- anywhere by 10 to 50 percent. So anytime you get tired of hearing me, I have great respect for Your Honor's instruction to stop.

THE COURT: I was hoping we could do this whole ball of wax in an hour. That would be probably a half-hour for you and a half-hour for the other side. I would assume that you're going to want to reserve some time for reply, but I'm prepared to listen carefully to you at this time.

MR. SCHEIER: Thank you, sir.

THE COURT: I am going to interrupt you so I am going to consume your time, but go ahead.

MR. SCHEIER: I welcome any questions that you have. I find it probably to be the most useful part of argument.

THE COURT: I agree. I've read the paperwork pretty

carefully and I have some questions.

MR. SCHEIER: Very well. Again, Your Honor, Michael Scheier on behalf of the Morgan defendants. Rather than go through what we've already put in our papers, because the Court has indicated he has read them, I thought I would give a little bit of a chronology to give the Court a sense of how we got to where we are by way of this motion practice and, in particular, the motion to exclude.

The first that my clients had ever heard a peep about damages from the plaintiff in this case was a couple of years after they filed litigation by way of supplemental Rule 26(a) disclosures and interrogatory responses, both of which were served on the same day, and it was on or about December 20th, 2011.

And I've placed those on the bench for Your Honor's reference because I will reference them. And just to get a sense of what we were told back in December of 2011, I refer the Court initially to the initial disclosures. And because the damage disclosures is identical in the initial disclosures and interrogatories, there's no need to review both, so I am going to key my remarks off of the initial disclosures.

And I would like to initially direct the Court's attention to the page marked number three of the disclosure itself and Category E, which is one of two damages categories that relate to the claims that remain pending in the case.

And as Your Honor will see, what we were told back in December of 2011, before undertaking any deposition discovery, was that the Trust was forecasting its need for an expert to give an opinion on the loss of enterprise value resulting from whatever conduct they were complaining of, which was not much of a surprise seeing how issues like loss of enterprise value and those type of concepts typically are handled by way of expert testimony.

But when you read further, the interrogatory goes on to identify a couple of offers, or expressions of interest, as the Trust noted, from a Jostens and Sun Capital in a certain amount of money. And also, as a top end of a damages calculation, at the bottom end they note a $54 million figure by a company known as J.H. Whitney in regard to a proposal that they had supposedly made to purchase the Antioch Company.

But then I would note for the Court that the plaintiff admirably discloses that some of that loss in value might not be attributable to the conduct of the defendants, and I guess impliedly telling us we're just going to have to wait and see.

Basically, as we put in our papers, the way we read this is we're going to use an expert and we kind of think this is what the expert is going to say, and we're not quite sure but just wanted to give you kind of an initial disclosure.

And you'll note that just under that paragraph the Trust acknowledges its obligations to supplement that

disclosure.

The second category --

THE COURT: So they were suggesting here that the damage calculation is simple mathematics, offer, minus the end offer, gives you the loss in value?

MR. SCHEIER: I don't mean to be flip, Your Honor, but it is simple math but done wrong because they note that -- approximate their damages to be not less than $121 million. But when you take the low end of the offer, the 148 million, and subtract out the 54 million, that in fact is less than $121 million.

So the simple math wasn't done particularly well in at least that part of the interrogatory. But that's not being flip or critical, it is just by way of pointing out that this seems to be a good faith effort to at least give us some indication of what they're thinking by way of damages, and we took it as such.

And then the second category of damages that the Trust identified that remained pertinent to the claims at issue in the case is on the prior page, page two under Category C, and those relate purportedly to fees and expenses paid to restructuring professionals as a result of the deepening insolvency of Antioch.

And when you go on to read the brief paragraph under that heading, the Trust notes that it intends to seek discovery

from such restructuring experts, restructuring professionals, whatever that means, and that they will supplement their initial disclosures once they receive that documentation. I'll give Your Honor a little bit of preview -- that never happened. Don't ever recall seeing a subpoena to quote, unquote, restructuring professionals, nor do I remember that interrogatory ever being updated.

So that's where things stood in December of 2011, and then the parties went off and began to undertake the discovery. And we flew around the country between New York and California and Minnesota and Dallas deposing dozens of witnesses, and all along, I was waiting to receive a document subpoena to this Jostens and Sun Capital, to J.H. Whitney, or to receive a testimony subpoena seeking a representative of one of those companies, but that never came. And we find ourselves now some time in the late fall of 2011 when it becomes relevant now, in light of Mr. Greenberg's report testimony in the opposition brief that's before us, and we took CRG's testimony by way of a gentleman named Michael Epstein.

The plaintiff was represented in that deposition. Not a single question about enterprise value of the company, not a single question about the CRG valuation, or purported valuation, whose results appear in a disclosure statement the company filed, and no discussion whatsoever about, generally, value of the company.

And we got up from that deposition in Boston, flew home, and the very next deposition was the last deposition, fact deposition in the case, and that was the deposition of the Trust, via or under Federal Rule of Civil Procedure 30(b)(6). The Trust could have designated anybody to be its witness. It could have picked Robert De Niro, it could have picked any number of people, but it chose Mr. Miller as its witness.

And under Rule 30(b)(6), of course, the Trust then undertook an obligation to prepare Mr. Miller to testify. It was not a personal knowledge deposition of Mr. Miller. It was not an expert witness deposition of Mr. Miller. We weren't seeking any testimony from Mr. Miller based on his firsthand knowledge. The Trust, of course, doesn't have a brain, it doesn't have eyes, it doesn't have a mouth, so you designate a witness, as you would with a corporation, to testify as to what the plaintiff's knowledge was.

And the federal rules also required us to -- put a burden on us to identify the Trust, the topics that we want to inquire about with regard to the Trust, and we did so, dutifully, and identified several topics that we went through on our 30(b)(6) notice. One of them pertinent to this argument asked the Trust to prepare a witness to testify about the type and extent of damages that any of the defendants' conduct caused the Antioch Company and to explain those damages.

And although the Trust counsel had objected to several

of our topics and we worked that out through negotiations, the damages topic was not one of those.

So understanding, based on the interrogatories and the disclosures and there not having been any further testimony relating to damages, the plaintiff was apparently still going to stick with these two categories of damages, those being Lost Value Damages and Wasted Professional Fee Damages as we approach Mr. Miller's deposition, but we were ready to hear whatever else they had to say about it, or I should say the Trust deposition.

When we get to the Trust deposition, Your Honor, and I brought the transcript here -- because I think it will be most useful rather than for me to give you my take on what Mr. Miller testified to, or what the Trust testified to using his mouth -- I thought I would read a couple of the excerpts so that Your Honor has a full understanding of where the parties stood vis-a-vis our knowledge of the damages that plaintiff was claiming at the close of discovery.

Now I put that, a binder, in front of you, Your Honor, and also provided it to opposing counsel, of Mr. Miller's deposition. And if you would be so kind, I think the most pertinent -- initially, I just want to highlight the Court or draw the Court's attention to three separate pages and excerpts of testimony.

The first would be on page 84 of the deposition, Your

Honor, and that appears on -- they're also just page numbers on the bottom, page 22 of the actual page you're looking at. This is a Min-U-Script. And you'll see that 84 begins on the top right column and there's a question here that goes something like this.

I asked: "Okay. With regard to Number Three --" and that number, Your Honor, refers to the number of -- it was the third topic on our Rule 30(b)(6) notice -- "fees and expenses paid to restructuring professionals as a result of the deepening insolvency of Antioch, did the Trust calculate what those fees and expenses are as of today?"

And the Trust answer: "Again, that's something I think we have an expert do.

"Question: Well, is the answer no, Mr. Miller, that the Trust has not done that yet?

"Answer: The answer is no."

And so Mr. Miller didn't shed any further light on the damages relating to wasted professional fees any more than the very dim light that they shed on that category damages in their interrogatory responses and initial disclosures. And Mr. Miller's deposition, I might add, Your Honor, was almost a year to the day after they served those discovery responses and initial disclosures. Both were in the December twenties.

The next pertinent question, Your Honor, is on the very next page. It is the next set of questions, and it is

after Mr. Miller for the Trust answers no as to the fees, I move on and ask:

"Okay. Category Number Five of damages, the loss of enterprise value that resulted from a tendered offer in the sale process.

"Do you see that?

"Yes."

And then if you turn to page 86, Your Honor, there's just some discussion where Mr. Miller is giving me his understanding of what enterprise value is. If you turn to the very next page, which is page 23 in your binder, it is page 86 top left column, I asked Mr. Miller:

"To this date has the Trust determined what the loss and enterprise value is from the company allegedly resulting from the tendered offer in the sale process?

"Answer: No."

There's only one more area that I wanted to point out to Your Honor, and that's on page 81 of the deposition transcripts, which is on page 21 of the document in your binder. And I reference this because the Trust, in its opposition brief, only quotes, Your Honor, a very small snippet of this response for the proposition that somehow they haven't abandoned their interrogatory responses and that those should have been sufficient to put us on notice of what their damages are here, and that they weren't going to rely on an expert.

There's a question and an answer, and I want to pick up Mr. Miller's answer right in the middle of line eleven of page 81. I had asked Mr. Miller about some -- a question about damages generally, and he responds, starting at line eleven on behalf of the Trust:

"So at this juncture where we are in a case having not yet engaged or gone forward with expert testimony for, you know, identifying testifying experts and that sort of stuff, I think our answer is, with respect to the damages, very much remain what we placed in this interrogatory," comma -- and here's the key to our motion -- "that these are the various categories of damages and that, you know, through the use of a testifying expert, we would expect to put specific dollar amounts on that."

So that's the pertinent testimony of Mr. Miller, vis-a-vis damages, a topic that the Trust had been aware about for weeks before this deposition and they were obligated to prepare a witness to testify to. They apparently either didn't prepare their witness or, as they state here, they intended all along to use an expert to testify about damages.

So we close up our books and we did this deposition at the Taft law firm. They closed the conference room, closed the lights and everyone goes home and that was the end of fact discovery. That was the last day. And we did it on the last day for a very specific reason, Your Honor. Because at that

point in time, there were going to be no more documents and there were going to be no more witnesses to support all aspects of plaintiff's case, including damages.

And so we walked out of the Taft law firm that day and we knew absolutely nothing about the damages. In fact, it appeared that Mr. Miller's testimony, he didn't do any sort of simple mathematical calculation, he didn't refer back to the interrogatory and tell me, let's see Jostens is 148 and Whitney is 54, and you subtract this from that, so I could cross-examine him on that. He just said no, we haven't done a lost value calculation and no, I haven't looked at professional fees, I think I am going to have an expert do that.

And we left. We are as in the dark as the conference room was when they turned out the lights as to what the damages were. But that's okay, because we were told they're going to have an expert. And expert discovery now, we were right on -- right at the cusp of expert discovery. And the way we had things laid out --

THE COURT: What facts were you precluded from discovering that would be relevant to damages?

MR. SCHEIER: Well, what their damages are is probably in the broadest sense. I left that deposition and asked the Trust, not Mr. Miller, I asked the Trust: What are the damages? Have they calculated their Lost Value Damages as of this date, that date being the last day of discovery? There is

no ambiguity. The answer is one two-letter word -- no.

So what facts do I need to cross-examine him on? What their damages were but I couldn't. Or, that's on the lost value side. What other facts didn't I have to cross-examine him on? What were the waste of professional fees? What professionals? Which invoices? What amount of time? Nothing. Those are the facts I didn't have.

THE COURT: Well, I understand that as to the latter, but as to the former, what facts were you precluded from discovering that would interfere with your ability to cross-examine their simple math of taking there was an offer here and a final value here and that's the loss of value?

MR. SCHEIER: Because Mr. Miller told me that they hadn't calculated their damages a year later. Not my responsibility to ask him: Well, didn't you send me an interrogatory? He knew he had that interrogatory. As of a year later, they apparently -- for all I assumed, they abandoned and actually it turned out that they did abandon the numbers and the theory in that interrogatory. But I asked them to prepare a witness to testify as to damages. And when I asked -- when I had asked, have you calculated the loss in value damages, as we sit here today, the answer was an absolute unequivocal, unmistakable, N-O, no. What am I supposed to ask after that? There's no question to ask.

THE COURT: So your position is they can't prove

damages without an expert, and the expert they've come up with is unreliable and there's another adjective?

MR. SCHEIER: Well, he's unqualified.

THE COURT: Okay.

MR. SCHEIER: And he's unreliable, and that kind of segues into the next step of the case. I was anticipating the day we would get the expert report, because the Trust didn't have any information for me about their damages the last day of discovery. And I received, the next stage in the case, I received Mr. Greenberg's report.

Now, I don't know if you looked at it, Your Honor, but the report is a mess. More than half of the report deals with issues that are no longer in the case and Mr. Greenberg was engaged after those weren't in the case, those being the 2003 transaction, and much of what he had to say about that was just flat out wrong factually and from a mathematical calculation. But I don't want to waste my time talking about that because those claims aren't live.

When you read the rest of the report which, by the way, was nothing more than -- it was noncompliant with Rule 26. It didn't list his opinions nor did it cite the record at all. It was really nothing more than a narrative form of their amended complaint.

So you read through it, and I'm still searching for a damages opinion. I don't think there was one, but to be

charitable, when you look at the very last sentence of the report, 25-page report, I've read through now 25 pages, I get to the last sentence -- and I've left that for you up there too, Your Honor. There's a binder with Mr. Greenberg's report. And what I read when I got to the very last sentence of Mr. Greenberg's report, page 25, he wrote: Mismanagement of and interference with the sale process by the directors and their advisers caused the company to lose the opportunity to realize between twenty and thirty million dollars in value and to waste $6 million of professional fees.

Okay. Is that an opinion? I don't know, but it seems to be, charitably, a stab at a damages opinion.

So with that in mind, the next event in the case was Mr. Greenberg's deposition, and of course, based on the fact that I received no factual testimony from the Trust as to their damages, I didn't hear about a simple mathematical calculation, I didn't hear about offers, I didn't hear about enterprise value. I heard only -- I heard, and I think it's pointed out by the record, that an expert will tell me all about their damages.

I got that one sentence and I went in to the deposition. And in that deposition, because the report was not compliant, one of the first questions I asked Mr. Greenberg was: What opinions are you going to be giving at trial?

And there was some wrangling by the -- by counsel, but

finally Mr. Greenberg got around to listing eight opinions. And I believe they start at page 111 of his deposition transcript, and I won't burden Your Honor with going through those, but I can tell you that only three of those opinions related to the sale process. And they were that the so-called dual track was detrimental to the company, the Board of Directors should not have allowed Lee Morgan to participate in the sale process or considered his offers; and then the Board of Directors did not heed the advise of its advisers; and J.H. Whitney was the best offer out there, that it wasn't acted on, that's my opinion.

So he didn't articulate in the deposition under oath any opinion that I could decipher as relating to damages. But you know what? I gave him the benefit of the doubt that maybe he forgot that one sentence as it appears in his report. So I went ahead, because now I've been led to believe that that one sentence must be his damages opinion, and I cross-examined him on the J.H. Whitney $54 million offer, the -- this concept of a CRG valuation at somewhere between 31 and 38 million, don't know if it is 32, 33, 34, 35, 36, somewhere in that range. And we've briefed Your Honor at length in response to those questions. Did no analysis of any of those numbers, basically just plucked them out of a couple different documents, did 54 minus, who knows, some number between 31 and 38, and he believes that's going to be his damages -- he believes those to

be the damages on lost value.

I'm not -- unless you have questions, I think it is pretty clear that what we believe about his testimony and those numbers, they are unreliable and he brought to bear no methodology in arriving at those numbers.

And what's worse is sticking with, again, the two-category damage analysis that we first learned back in December 2011. Mr. Greenberg said, yeah, $6 million in professional fees. But he never saw an invoice, didn't understand what professionals, when, for which board, what they did, said that some of them did give value, some of them didn't give value but has no idea. Just a number plaintiff's counsel gave him. And the $54 million? Just some hearsay number out of -- out of a letter of intent.

And this is where we were left at the end of Mr. Greenberg's deposition, a testimony -- no fact testimony as to damages, and only an expert's testimony that didn't seem reasonably related to any facts or the admissible facts in the record. And that, Your Honor, that entire -- that entire chronology I just gave you was to try to focus the Court on why we filed our motion and what the record looked like when we filed our motion.

And I don't think I need to, you know -- the papers are what they are and you read them. The important next event is the opposition brief. I get the opposition brief and it

appears that plaintiff is, once again, done kind of a little bit of a soft shoe and has shifted positions again. They seem to have abandoned Mr. Greenberg as an expert damages witness because, hey, it is just simple math. Simple math that the Trust couldn't tell me about six months earlier in their deposition, and now it is just simple math.

And guess what? The only thing Mr. Greenberg is actually going to testify to is an opinion he never gave. In a passing remark he said something like -- and we can look at it in a moment -- the $54 million offer, if there was an Asset Purchase Agreement ever closed, and if there was a 363 sale would have been the minimum that the company would have gotten in a 363 sale. That's it. It's not an opinion. It's in response to a question I asked him, and it was two hours into the deposition.

And it was really in response to me asking him: Can you guess what might have -- can you give me a guess as to what the real value of the J.H. Whitney offer was?

And he said, yeah, you know, my guess is that they had done some due diligence -- no, I asked, rather, whether he knew for certain that the J.H. Whitney deal or proposed transaction yielded $54 million to the company. And he said, frankly, he didn't.

And to kind of drive home that point of where we are, I get now an opposition brief for the only opinion I'm being

told he's going to give, is that the $54 million was the minimum bid the company would have gotten, the 363 sale with a citation to his testimony.

And I thought to myself, I don't really recall that being an opinion, and lo and behold it's not an opinion in his report, it's not an opinion in his deposition. And if Your Honor would indulge me, I put before you a binder with Mr. Greenberg's deposition, and I would like to just have us take a look at just a brief question and answer session on pages 294 and 295, the numbers at the top right corner.

THE COURT: Very well.

MR. SCHEIER: Thank you, Your Honor.

On 294 I begin at line eleven where I ask:

"Do you recognize that the $54 million price that Whitney had stated in that letter of intent was contingent on additional due diligence by Whitney and ultimately the closing of a definitive agreement?

"Answer: Yes, which is more than customary.

"Question: And you don't know one way or the other, if the Board of Directors accepted that offer, that the company would actually realize the $54 million amount of consideration that is set forth in Whitney's letter of intent, correct?

"Answer: There's no way to know that."

And then I asked: "And there's certainly no evidence in this record to venture a guess?"

I didn't even think he could guess.

And Mr. Greenberg's answer was: "Well, they did a substantial due diligence."

This is on 292, line two.

"They did substantial due diligence. If it went -- if it went into an APA --" which, in his vernacular, is an Asset Purchase Agreement, he says: "If it went into an APA into a 363, it would have been a guaranteed bid."

And then we cut each other off a little bit and then is the quote you see in their opposition brief. He says: "The worst it would have been, would have been $54 million if there wasn't anybody else stepping up to the option of the 363 sale."

So, and then I asked him a question at 11: "Although J.H. Whitney never, by way of definitive agreement, agreed to pay $54 million because it never actually completed its due diligence, correct?

"Answer: They'd done a fair amount of due diligence ahead of that, but --"

And then I asked: "Did you see any evidence that they completed their due diligence on the $54 million price?"

And on line 21, Answer: "There's no way to know that would be the final price."

So, right now, as we sit here today, I'm told that's all they want Mr. Greenberg to testify to before a jury as an expert. And I'm here to argue, A, it is not an opinion.

That's not the way litigation should go where I find out in his -- I find out in an opposition brief what his opinion's actually going to be, and it is not an opinion that he gave me in his deposition or in his report, completely different opinion, and it is so narrow that I never even thought of that. When I went in the deposition, that was never their position.

And that just came out based on a back and forth of a witness, and you look at that and you try to figure out even, again, being charitable, that it is some sort of a, quote, unquote, opinion, it is really not based on -- he's not qualified to give such an opinion because -- and even though in their brief they say something like, Scheier can't even, he doesn't even have the gall to question Greenberg's qualifications to say that the $54 million was going to be a minimum bid.

But when I checked to see what they cite for his qualification to talk about a 363 transaction, you go into -- they cite page four of his report. Now when you look at page four of his report, Your Honor, all it says is that -- and I have it here and I invite you to have a look at it if you think it would be useful.

But this is what they cite, even assuming that that's an opinion that they can give to a jury, that he can give to a jury, that the $54 million would have been the minimum bid, the only thing they cite is page four of his report.

And I scanned page four of the report, and I'm looking for what this guy Greenberg has done vis-a-vis 363 sales, and the first time I see something about a 363 sale is in the third paragraph under the heading talking about the firm, Silverstone. And the only reference is that in addition to some other things, quote, Silverstone acts as an investment banker in Section 363 sales under Chapter 11 bankruptcy. That's the company.

You go to the next paragraph and it talks about Greenberg and his qualifications. Not a mention of 363, not a mention of bankruptcy. He didn't testify about 363. As far as I can tell from this report and his deposition testimony, the first time he heard the 363 was when he was scribbling out what Silverstone does, and he has a couple of partners there.

So frankly, I don't think there's any -- the plaintiff, whose burden it is to prove that this witness has testified, even in their new-found opinion, that $54 million is a valid data point to measure damages, hasn't put forth any evidence that I can see that this witness is qualified to opine on what ultimately a transaction would look like had it in fact closed through 363.

THE COURT: Well, bear with me on this.

MR. SCHEIER: Yes.

THE COURT: Based on his knowledge and experience as a professional dealing with letters of intent, purchase offers,

due diligence and Section 363 sales, he proposes to testify that the J.H. Whitney 54 million letter of intent was a reliable estimate of what the deal would have been worth at closing.

Now, whether or not he has any damages -- experience to be a damages expert based on his life work, is he not in a position to say that the letter of intent was a reliable estimate of what the deal would have been worth at closing?

MR. SCHEIER: Not in the context of a 363 sale he doesn't.

THE COURT: Because he didn't identify any work in that area?

MR. SCHEIER: None in that area.

THE COURT: Okay.

MR. SCHEIER: But he's got other problems with the fact that he's not qualified.

THE COURT: Well, isn't the real problem that this $54 million letter of intent from J.H. Whitney is hearsay? And there's nobody from J.H. Whitney who has testified to it? And Mr. Greenberg did not analyze the reliability of it at all, he simply accepted it as true? How in heaven's name does that hearsay come into evidence?

MR. SCHEIER: I agree, and you saw we briefed that. There's no way it comes into evidence.

And by the way, Your Honor, there is no evidence that

J.H. Whitney was ready, willing and able to close at $54 million. Zero. Not a piece of testimony. Not a piece of paper that indicates they were ready, willing and able to pay $54 million in cash if there was no better deal offered at a 363 auction and bankruptcy.

So not only is the letter of intent hearsay itself, because they would be attempting to get it in for the truth of the matter asserted, but what they really need is evidence from J.H. Whitney that, yes, we were ready, willing, and able to close, but -- and then something happened and it is that, whatever happened, it's one of the defendants' fault. There's no evidence like that.

And what you see in their brief is that somehow, because my client purportedly took action to fire the board -- which -- well, I'll accept that for now, I'll even except their conspiracy theory for now -- that their action is what killed the Whitney proposal. There's absolutely -- and they say that's why they should not be precluded from entering into the evidence Mr. Greenberg's prognostication as to how that deal would have turned out. The truth of the matter is the way they could have proven that the $54 million -- that LOI would have been over the $54 million would be to depose J.H. Whitney, and nobody stopped them from deposing J.H. Whitney by way of documents or by way of testimony.

And so the claim in their brief that somehow my

client's action or actions of other non-defendants in the case should not be held against them, that they can't definitively show or that Greenberg can't say with certainty that that deal would have closed is -- well, I probably shouldn't use the word, and I won't, but it is just not -- it is not a credible argument, because the plaintiff had one solid year, if not longer, to talk to someone at J.H. Whitney, to get an in-court declarant that would have been able to tell us everything about what J.H. Whitney was thinking, how they got to the $54 million. Was it really a reflection of the company's enterprise value? Were they really going to pay $54 million?

And by the way, by the way, Mr. Greenberg notes that the only reason, the only basis for his, quote, unquote, opinion that the $54 million deal would have closed is because J.H. Whitney had done a substantial amount of due diligence.

Recall the letter of intent. The inadmissible letter of intent was just that -- a nonbinding letter of intent. And he said, well, they did a lot of due diligence and, in my experience, once you're that far down the road in due diligence you're pretty close to that number.

I have to tell you, Your Honor, you can comb that record clean. There is no evidence of what J.H. Whitney did or didn't do vis-a-vis due diligence. That is nothing more than rank speculation and self-serving words that's nothing more than now being the plaintiff's position.

So there are so many problems, other than just the hearsay problem, that they have now with this extremely narrow opinion that they've called upon Mr. Greenberg to give that there's really no -- from our perspective, you can tell from our papers, there's really nowhere for them to go in that regard. And he's not in a position -- Mr. Greenberg is not in a position to support any damages calculation they could offer.

And as a result, it's our view that, first, that they abandoned him as an expert; but, if you want to give credence to that one sliver of an opinion, it's not even something that they could ever get to a jury, and so we would ask the Court to grant our motion to exclude Mr. Greenberg.

Happy to talk about the implications to that going forward in the case. I don't know if the Court wants me to do that now or today at all, because that bleeds into our summary judgment motion on damages. But the Court -- I await the Court's direction on how to proceed further.

THE COURT: The issue as to whether J.H. Whitney would have actually closed on the letter of intent and whether this expert takes into consideration that, why isn't that a subject for cross rather than admissibility?

MR. SCHEIER: Well, like I mentioned to Your Honor, we're at the summary judgment stage now. And the question is, really, whether there's evidence to take to a jury. And there is no admissible evidence. We've cited you a myriad of Sixth

Circuit cases that hearsay matters on summary judgment.

THE COURT: I thought experts could rely on hearsay.

MR. SCHEIER: Experts may be able to rely on hearsay, but then you have to determine whether or not the expert did any diligence or any investigation of what that hearsay is.

THE COURT: And the reliability of the hearsay statement?

MR. SCHEIER: Checking out the reliability of the $54 million figure, to checking that the record shows that there was actually due diligence done in approaching that number.

THE COURT: So experts can rely on hearsay but they have to do more than simply accept it at face value; they have to analyze its reliability.

MR. SCHEIER: Well, it also has to be tied to the facts of the case. They're really, the only inadmissible document here is the offer itself, is the J.H. Whitney letter of intent. All that tells us is that J.H. Whitney offered $54 million. And Mr. Greenberg goes on to say that the $54 million would have been the minimum amount that the company could have realized at a 363 sale, but he doesn't have the expertise to say that. Nor is there any basis in fact for his factual basis saying that they did due diligence and they were far down the path in due diligence. But there's no -- actually, there's no evidence of that at all from J.H. Whitney,

which is who you have to get it from.

THE COURT: And the other problem is that you have the J.H. Whitney number and then you have to have a number to subtract from it. And they proposed to subtract from it the number that arose out of the bankruptcy proceeding?

MR. SCHEIER: And that was kind of another slight of hand that threw us for a loop, in light of the history that I related to Your Honor, from the point of the disclosures to the point of the deposition.

In the opposition brief, again, they've taken another turn. It is not fair. I'm litigating, I'm chasing ghosts all the time. And once I catch the ghost and try to get my arms around it, there's another aberration set up I have to chase. Now Greenberg is not going to testify about the 54 million. He was told to assume it as a fact. And they write in their brief that the bankruptcy -- as if this somehow affects its admissibility. They write in their brief that the bankruptcy court adopted that number as the company's enterprise value? Nothing of the sort, Your Honor. It is contained in a piece of hearsay, the disclosure statement, that, in itself, contains hearsay, and that's the CRG valuation.

And unlike J.H. Whitney, that they didn't go bother to depose and seek documents from, they deposed CRG and didn't ask him a single question about their valuation.

It's absolutely inadmissible. He has done no -- as

you saw in our brief, I asked him several questions about that number. He accepted it blindly. And now, in their opposition brief, I learned, let's just assume fact.

Guess what? You have to prove, you have to prove the assumed fact is actually in the record. And we're at the summary judgment stage. No more playing games now. There's no more initial disclosures and no more interrogatories. We're at the summary judgment stage. There is no basis to get that CRG valuation in front of a jury to consider.

THE COURT: Because it's hearsay?

MR. SCHEIER: Because it's hearsay and there's no credible way that they can argue Mr. Greenberg can rely on that number, because he did nothing in terms of investigating the CRG valuation. He didn't even see the valuation itself. He didn't see the valuation. He didn't see CRG's underlying work papers. He doesn't know who at CRG did the valuation. He doesn't know what financial assumptions were built into the CRG valuation, nor does he know what financial data the company gave to CRG to work up those valuations.

Nor -- get this. Nor did Mr. Greenberg get the opportunity to look at Mr. Miller's and Ms. Andrew's Periculum report that they commissioned in the bankruptcy that indicated the value of the company was probably, at a minimum, $80 million and possibly up to $100 million in enterprise value, and that was a real expert report.

So when Mr. Miller and Ms. Andrew want to commission an expert to value a company, they know how. And it ain't on my say so. You just have to look at the Periculum report that we put in the record, and they didn't even bother to show that to Mr. Greenberg.

So the guy was told nothing other than to look at a number in a disclosure statement and base his -- what clearly was going to be a damages opinion. When you look at that report, there's no other way to read it. That was their best stab at it. He was told to rely on that and he did nothing to verify anything about the credibility of that number.

And that's where we are, Your Honor.

THE COURT: So the plaintiff Trust is relying upon this bankruptcy number of 31 or 32 to 38, and yet, in another piece of related litigation, they hired an expert to attack the credibility and reliability of that number?

MR. SCHEIER: That's precisely what happened. And we put that before you. They were prepared -- they say they never sponsored the witness actually getting on the stand and testifying? They certainly sponsored that report and paid good money out of Antioch's treasury. Don't forgot, they represent creditors. Their legal fees, expert fees, are funded out of Antioch. Antioch paid Periculum. I don't know how much, but that's a real expert report, to do discounted cash analysis, to consider the firm's financial projections, and they chose not

to disclose that to the court.

But more importantly, I'm not here to quibble with them over that issue. I find it astounding that they didn't provide that to their expert in this case.

And by the way, you say it's related. It is basically the same litigation. It is really the same litigation. The question is what the value of Antioch was at any given time.

And by the way, I might add, Your Honor, just so you understand what that 30 to 38 million dollar number is, that appears to be or purports to be the valuation of the reorganized company as of the petition date. It is not even -- I mean, on its face, it is not even a valuation of the company that existed that's the subject of this litigation.

It is all messed up. It really is. What it is is a product of an inability to stake out a position and work with it. They're always -- the Trust is always reacting. And that's -- this is where you end up when you're not -- when you're just reactionary basically. You end up where they are today which, from our perspective, is without a damages' expert, multiple representations that they will use an expert thereby foreclosing discovery, and at this point unable to prove the most critical element of every single cause of action in a complaint -- damages.

THE COURT: So your position is, you'll state it to me in five sentences or less, that if the Court excludes this

expert witness, the case is over?

MR. SCHEIER: Yes, sir, except for, as we noted, a few, a number of low value preference claims and a claim for fees paid to Condor Insurance Company of about $1.1 million.

THE COURT: Are you relying on any legal authority that if I preclude the expert, they can't prove damages and, therefore, the case is amenable to dismissal? Are you relying on any legal authority other than the *Info-Hold* decision?

MR. SCHEIER: The *Info-Hold* decision, the *Cole* decision, several other cases we cited. I will admit to the court that I didn't write them down, but they're in our papers.

THE COURT: You understand *Info-Hold* is in the Court of Appeals?

MR. SCHEIER: I did understand that it is on appeal. There's also *Cole* authority.

But the bottom line is I really don't -- I'm also relying on general concepts of evidentiary -- of the Rules of Evidence. I mean, what I can tell you that maybe the *Info-Hold* parties didn't have is I can tell you, Judge, even if you don't, even if you exclude them, let's analyze whether they can prove their damages any other way. I'm willing to have that discussion. They can't.

What are they going to do? They gonna -- they can't use the 54 million and the 31 million. You don't even have that out, that an expert can rely on inadmissible hearsay

because then there is no expert. They would just be putting on or try to put on factual evidence. But like I said, there is no in-court declarant from J.H. Whitney to talk about that to a jury, and there's no one from CRG that can talk about that, that is going to come into court and talk about the valuation. So you can't get that in front of the jury.

There again, in terms of chasing ghosts all over the landscape, there are hints in their opposition brief that they still might talk about the November 2007 expressions of interest from Suns and Jostens, but how are they going to get that in front of the jury? The only evidence of that in the record is a presentation that Houlihan made at some point in 2007 and 2008.

So you have a double hearsay problem. They have no basis, even if you say they're not estopped and they're not waived because, you know, lack of concepts or we're unsure about what the circuit is going to do with your holding in *Info-Hold* in that regard. Here, I'm saying, put the prejudices aside. I don't have to show prejudice, by the way, under Rule 37, but put it aside and look at how are they going to get any damages into evidence? There's no admissible evidence of damages in the record, and that is the basis of our summary judgment motion.

But because they raise the issue in opposition, we briefed it at length on this specific motion to exclude in our

reply brief. There is no way they can get the expressions of interest in front of the jury that I can conceive of. Maybe Ms. Andrew will enlighten us. There's no way to get the $54 million letter of intent in front of the jury, and there's absolutely no way to put before the jury the valuation, or the purported valuation, of the CRG group.

So at the end of the day, Your Honor, you don't have to stick your neck out and on some technicality say, hey, say to them, you're out because you represented you were going to use an expert and you didn't. I think that's a good basis and a solid basis on the cases that you cited in *Info-Hold*, on the cases *Cole* cites as a matter of fundamental fairness, to my clients as well. But it's also justifiable because when you peel that onion away and say, all right, I'm going to forgive them those sins, I'm going to forgive them those sins, let me see what they've got, they got nothing to prove damages.

THE COURT: Very well. Are you able to enter an appearance in the Court of Appeals on *Info-Hold*?

MR. SCHEIER: Well, maybe it would give me an opportunity to enter one here, but whatever Your Honor needs, I'm at your service.

THE COURT: Very well. Let the record reflect you took 50 minutes --

MR. SCHEIER: Five zero?

THE COURT: -- on a 30-minute estimate.

MR. SCHEIER: But I did give you the percent. I typically underestimate by 10 to 50 percent.

THE COURT: So 50 percent of 30 is 15, that gets us to 45.

MR. SCHEIER: That's -- I --

THE COURT: You may be seated.

MR. SCHEIER: I learned my math from the Trust.

THE COURT: Very well.

Ms. Andrews, if you're still breathing.

MS. ANDREW: Thank you, Your Honor. I don't know what you prefer, if I start by --

THE COURT: I'm really worried about this. I don't understand how you're going to get into evidence J.H. Whitney, and I don't understand how you're going to get into evidence the number 32 to 38 and then do the simple math. That's why I set this for oral argument. It's causing me extraordinary pause.

MS. ANDREW: Okay. Well, why don't I start, then, by going right into trying to respond to some of the concerns you raised during Mr. Scheier's argument?

THE COURT: How are you going to get those hearsay statements into evidence?

MS. ANDREW: Well, to begin with, all of the expressions of interest were produced in this case. They were deposition exhibits. There was testimony about them by

numerous witnesses in the case.

THE COURT: That doesn't affect the hearsay analysis, does it?

MS. ANDREW: Well, these are testimony by Houlihan's representative that brokered and solicited the expressions of interest, that talked to J.H. Whitney about them, and by the members of the Board of Directors who received and considered the expressions of interest.

THE COURT: The J.H. Whitney letter of intent is an offer from J.H. Whitney. How does that statement of Whitney come into evidence?

MS. ANDREW: Well, it is an expression of the value that the market was placing on the company. This is a company that --

THE COURT: J.H. Whitney needs to say that, right?

MS. ANDREW: Well, J.H. Whitney has been listed as a potential -- representatives of J.H. Whitney were listed by the Trust as a potential witness on witness identification lists early in the case, as were representatives of Sun and Jostens and Marlin. The defendants did not choose to depose those people, but they are on the potential witness list. And there's been extensive testimony in deposition testimony about these expressions of interest.

THE COURT: I don't care about the testimony about them. I want to know how the estimate, the offer of J.H.

Whitney, is coming into evidence. And what I'm hearing is, they're on our witness list. We're going to call them at trial. Is that the answer?

MS. ANDREW: That is a possibility, as well as all of the other testimony that's already been taken on those expressions of interest and Houlihan's discussions with Whitney that came to that point of bringing forth a written expression of interest to the company. Houlihan did --

THE COURT: We must be --

MS. ANDREW: -- an exhaustive --

THE COURT: We may be -- we must be passing in the night and missing. I mean, this is -- I wasn't very good at it. This is an evidence question. This is a hearsay. This is a statement, an out-of-court statement by Whitney that we'll offer 54 million, and you want to offer that for the truth of the matter. How are you going to get that into evidence?

MS. ANDREW: Because we can have evidence, testimony of the conduct around the statement and that the parties were proceeding forward to close the deal, to they exchanged Asset Purchase Agreements and further conduct of the parties --

THE COURT: I make an out-of-court statement. You want to put it into evidence for the truth of the matter. You're going to do that by saying what everybody else said about my statement?

MS. ANDREW: Well, what everyone else did about your

statement, the conduct of the parties is evidence.

THE COURT: Okay.

MS. ANDREW: It's evidence. You know, this was a company that was declining in value throughout the time that they were trying to sell it. Their sales were continuing to decline and it was what several witnesses, including Mr. Spencer of Houlihan, have called "to catch a falling knife" scenario, where parties didn't know where the sales decline was going to end. And so it is difficult to do traditional valuations of a company, discounted cash flow type of valuations where you need to know historical sales and earnings and projected sales and earnings. And the company, at that time period, seemed unable to accurately project sales, even month to month.

THE COURT: So why don't you hire an expert to value the company at that time?

MS. ANDREW: Well, an expert -- any expert would be faced with that same problem. There was no good data coming out of the company during that time period because it was the catch a falling knife. Everything was changing week to week, month to month, irreliable forecasts.

And so an expert looking at that couldn't have done a reliable discounted cash flow analysis at any point in time. So instead, what Mr. Greenberg did is, let's look at what the market was actually saying, given the chaotic situation at the

company. Houlihan did an exhaustive sale process. They canvassed more than 100 potential purchases in the first phase and more in the second, and this is what they were coming forward with was their expressions of interest.

THE COURT: So you're telling me that nobody could ever value the company accurately because it was a knife falling to the floor?

MS. ANDREW: Not in the traditional ways that these financial people do discounted cash flow.

THE COURT: Then how are the fact finders going to value the company?

MS. ANDREW: A jury can look at the fact that there were buyers who made offers --

THE COURT: You better get those offers into evidence.

MS. ANDREW: I understand, Your Honor.

THE COURT: And how are you going to do that?

MS. ANDREW: -- who were looking to move forward. And then, in a bankruptcy auction, bid up the price or bid in additional liabilities might have been assumed that these are -- there's evidence beyond Mr. Greenberg of what happens in a bankruptcy sale process and that it is very typical for the price to go higher. And a jury could look at that and make a reasonable estimate of if they believe, based on the facts before them, that if the bankruptcy process had been allowed to proceed with J.H. Whitney, the 363 auction, whether there would

have been a purchaser and at what price.

THE COURT: So that's the 54-ish? That's the top end?

MS. ANDREW: That's the 54-ish --

THE COURT: How do you get the bottom end in?

MS. ANDREW: That's not the absolutely top end. The bottom end is, and perhaps Mr. Scheier just doesn't understand what we're saying, and we'll give him the benefit of the doubt on that --

THE COURT: And I don't like that sort of stuff, but he started it. Go ahead.

MS. ANDREW: He did.

This company, there's not speculation about what happened ultimately to the company. It went into bankruptcy. It went through a pre-packaged plan of reorganization in Dayton bankruptcy court.

The pre-packaged plan of the organization treated some classes of unsecured creditors differently than others, which is a no-no in bankruptcy court. Similarly-situated unsecured creditors need to be treated the same, so they all get one cent on the dollar, or they all get nothing.

This plan called for trade creditors that the company wanted to pay to keep doing business with to be paid in full, and other unsecured creditors, including the subordinate noteholders who Mr. Morgan represents and the ESOP noteholders, to get nothing. And in order to do that, the debtor and CRG,

its restructuring adviser, had to persuade the court that the value of the company as it entered bankruptcy was worth less than the total amount of the secured loans, which was in the neighborhood of, excuse me, of $42 million at the time that the company entered bankruptcy.

And so that was the purpose of CRG's valuation in its disclosure statement was to prove to the court this company is worth less than we owe the secured creditors and, therefore, they can choose. It is really their money, and they can choose to pay some of these secured creditors and others and you, the court, should approve this.

We, on behalf of the unsecured creditors, "we" being Taft, did retain Periculum to try to do valuation of the company going forward. Not the company that was in bankruptcy, but what was the value of the company going forward as a going concern? To argue that it was actually worth more than the value of the secured loans and, therefore, the court could not accept the plan of reorganization that was proffered by the company and the secured lenders.

The court rejected that. Mr. Scheier would like to tell you that the court did not, quote, adopt CRG's report but the court did confirm the plan of reorganization, which was based on that concept that the company was worth less than the amount of the secured debt. And, in fact, if you look at the order of the confirming the reorganization, which is a judicial

order, this Court can take judicial notice of an order of a district court. The bank, the secured lenders, received rollover loans in the amount of $31 million, even though they were owed more than that. And then they received preferred equity in the reorganized debtor. And that's it. They didn't receive any other value. The unsecured creditors received junior equity in the reorganized debtor, if they chose to opt in and waive claims against certain parties.

Those, the equitable value, both the preferred and the junior, turned out to be worth nothing because the company then entered the second bankruptcy a year ago.

So the actual value of the company is not speculative. We know the bottom end. The bottom end is the company went into bankruptcy and the secured lenders got 31 million of their loans rolled over and perpetuated and eventually those were paid off.

But all other value of the company was wiped out by that bankruptcy. And so that's not a speculative number. That's not hearsay.

THE COURT: What number are you speaking of?

MS. ANDREW: I'm speaking of the $31~million loans to the secured lenders and --

THE COURT: And that reflects a bottom end valuation of the company?

MS. ANDREW: Yes; yes, Your Honor.

THE COURT: And that's reflected in the Order of Confirmation?

MS. ANDREW: Yes.

THE COURT: The Order of Confirmation says that the creditors get 31 million?

MS. ANDREW: It listed it all out. It listed what the banks had going in, the balance of their loans, what the loans would be coming out.

THE COURT: And what statement says that because these creditors got 31 million that's the bottom end of the valuation of the company? What valuation opinion is reflected in the Order of Confirmation?

MS. ANDREW: Perhaps I'm not following your question.

THE COURT: What number are you trying to get out of bankruptcy? You're trying to get a number to subtract from the 54 million, right?

MS. ANDREW: Right.

THE COURT: And you're getting to 31.

MS. ANDREW: So I'm getting to 31, and the reason it's not a hard flat 31 is somebody could argue, well, the secured lenders also got this preferred equity that you could say had some value at the time, even though it turned out to have no value.

THE COURT: Who states the opinion that at the time of the bankruptcy the valuation of the company was 31 million?

MS. ANDREW: Well, it is not an opinion. It's a fact.
THE COURT: And that fact is reflected in the truth that the creditors got 31 million?
MS. ANDREW: Right. Yes, Your Honor.
THE COURT: And who is going to explain that to the jury?
MS. ANDREW: Well, any number of witnesses could explain that.
THE COURT: Well, give me one example.
MS. ANDREW: One example would be the trustee of the Trust, Mr. Miller.
THE COURT: So what are your damages?
MS. ANDREW: Well, our damages are --
THE COURT: In terms of lost valuation of the company.
MS. ANDREW: In terms of loss of value of the company, as a minimum, the difference between the $31~million floor and the $54~million Whitney offer, with the potential that that could have actually been higher through the auction process in bankruptcy court.
THE COURT: How could it be higher?
MS. ANDREW: Because we know for a fact that we had two other bidders still alive at the time, Marlin and Monomoy, who would have been likely to have bid in an auction process. You would have had at least three companies, if not more, bidding to purchase the assets of the company. And that

process would have been likely to bid up the price or, equally relevant in this situation, a bidder could have said, I won't pay more in cash but I will -- I will assume liability for some percentage of these other unsecured creditors, the ESOP notes or the subordinate numbers.

THE COURT: So what number changes, the 54 or the 31?

MS. ANDREW: The 54 could go higher, and it is our position that a jury could reasonably determine that, based on --

THE COURT: That someone would come in and offer more than J.H. Whitney?

MS. ANDREW: Correct, Your Honor. Based on evidence in the record that there were at least two other parties who had been competitively bidding with J.H. Whitney.

THE COURT: Who were those, Sun Capital and somebody else?

MS. ANDREW: No. At that time it was Marlin and Monomoy.

THE COURT: Sounds really speculative.

MS. ANDREW: Well, it is not really speculative.

THE COURT: Somebody might have come in --

MS. ANDREW: I guess --

THE COURT: I guess we should reach an agreement who gets to talk over whom.

MS. ANDREW: Yes, I'm sorry. Definitely you win.

THE COURT: Very well. I'm trying to get my questions answered. I'm not trying to be a jerk.

MS. ANDREW: Okay.

THE COURT: And I lost my train of thought.

MS. ANDREW: You were asking whether it was speculative.

THE COURT: Yeah. The response is, well, some company may have come in and bid more than J.H. Whitney because? Yeah?

MS. ANDREW: Okay. I would phrase it differently --

THE COURT: Okay.

MS. ANDREW: -- and I would say not just some company might bid but two companies that had already placed bids for the company just weeks prior.

THE COURT: And what bids were those?

MS. ANDREW: They were bids by Marlin and by Monomoy in --

THE COURT: And what did they bid?

MS. ANDREW: -- in May of 2008. And off the top of my head, I want to say one was 51 million and one was 45 million, but those bids were right at the same time, in early May. And Houlihan's representative, Spencer, testified that they were still alive and interested.

So it is not that I'm just hoping randomly that some company would come in and bid but, Your Honor, you are correct, there is an element of not knowing because the process was cut

off by the actions of the defendants. So we never had this auction, and so we can't know for sure what would have happened in the auction, that's true, and that's why Mr. Greenberg said that under oath, no, I can't tell you exactly what would have happened. He says he believes that the 54 would have been the worst result, but he can't know for sure because of their conduct.

And there's case law we cited in our brief that says where the defendants' actions create the uncertainty, that can't be held against the plaintiffs. Rank speculation is not a permissible way to show damages, but this is reasonable estimation based on known facts that are in the record.

THE COURT: Are you going to evidence your damages on loss of valuation by expert testimony or fact testimony?

MS. ANDREW: Your Honor, we would use a combination. There is, excuse me, as I said, quite a bit of factual testimony in the record that goes to damages, that goes to the value of the company as it was falling, the falling knife, but we would also use Mr. Greenberg and his expertise in having been through many circumstances like this, sales of distressed companies, restructuring.

He looked at all of the evidence relevant to the sale process, all of the deposition testimony, all of the exhibits, and it was his opinion that Houlihan had conducted an exhaustive marketing process for the company and, therefore,

the expressions of interest that were coming in were reliable expressions of the value of the company. Fair market value is ultimately the best measure of the value of a company. And so these were expressions of fair market value that were coming in.

THE COURT: So where in Mr. Greenberg's written 25-page opinion does he state the valuation, his opinion as to loss of valuation of the company?

MS. ANDREW: He states it in the last paragraph of his opinion. And Mr. Scheier says that it is only in the last sentence, but the whole paragraph relates to damages and actually explains how he arrived at the number in the last sentence.

So that last paragraph starts on page 24 and is really a combination of causation and damages opinion, but he discusses the $63~million Sun offer, the $54~million letter of intent, and the ultimate value in bankruptcy of 31 to 38 million. And then at the very end, discusses -- puts in an actual number for that.

And while Mr. Scheier says he couldn't figure this out at deposition, all of the attorneys who asked Mr. Greenberg questions were able from their questions to see that Mr. Greenberg was subtracting those numbers as values in points --

THE COURT: I thought you told the parties and the

Court repeatedly on each and every opportunity that you were going to prove damages through expert testimony.

MS. ANDREW: Well, we told -- we said two things. We said we are looking at the loss of enterprise value through expressions of interest of value, expressions of value at different points of time, and we also said we expect to have expert testimony on that. Both of those things remain true. We have expert testimony on those expressions of interest and which are the most critical ones to look at in terms of point in time comparisons.

THE COURT: Your 30(b)(6) witness said: We don't know anything about damages. We're going to get an expert to pull that together for us.

MS. ANDREW: The 30(b)(6) witness said: We said what we said in our interrogatories, that we're looking at expressions of interest at different points of time and that we expect to have an expert witness testify to that. And that's in fact what happened. We had an expert witness testify to different expressions of interest at different points in time as a way to look at the value of the company.

The expert, and this is somewhat of an aside, but Mr. Greenberg, a lot of his report goes to causation, and this motion that's before the Court today is a limited motion as to his opinions as to damages. So we have not addressed his opinions as to causation and whether those are reliable and

credible.

And so they're just seeking to -- I guess, according to Mr. Scheier, it is just one sentence of the report he's asking you to strike. In his view, that's the only part of the report that goes to damages, and he's only seeking to strike the expert testimony as to damages.

THE COURT: Is Mr. Greenberg a damages expert for you?

MS. ANDREW: He is our expert as to the valuation of the company, the damage that was caused by the loss in enterprise value. He's not -- I don't know what a, quote, damages expert is.

THE COURT: An expert who is going to testify about damages.

MS. ANDREW: Well, in this case, yes.

THE COURT: Okay. What's going on with this $6 million of unauthorized or wasted professional fees? Have you not identified those $6 million worth of fees?

MS. ANDREW: Your Honor, I will admit that we did not supplement our interrogatory to identify those. The $6 million in fees is a number that was just calculated by adding up invoices. All of those invoices were produced to all of the parties in this case. In fact, most of them came from defendants, the professionals that we're talking about all, at one point in time at the time that they produced documents, were defendants in this case. They've since been dismissed.

That's CRG and Houlihan, McDermott Will and Emery, which still remains a defendant in a related case, and --

THE COURT: And some other professional.

MS. ANDREW: I'm leaving one out.

THE COURT: That's all right. You've seen one professional, you've seen them all.

MS. ANDREW: And all of those invoices have been produced. I admit, and I fall on my sword, that we did not supplement our interrogatory to list out all of those invoices with totals.

THE COURT: So --

MS. ANDREW: There is evidence in the record that the process, this sales process, was delayed by the actions of the defendants, and a jury could look at that and decide that the process should not have taken so long and therefore some portion of the professional fees were unnecessary and wasted because, as the process went on, all of the tickers were ticking on all of these professionals.

THE COURT: And how does Mr. Greenberg's expertise apply to that?

MS. ANDREW: He does not have a particular expertise in that regard, and I believe in our brief we did state that we are not relying on Mr. Greenberg for that part of our damages.

THE COURT: Are you relying on Greenberg for any part of your damage calculation relating to unnecessary professional

fees?

MS. ANDREW: No, Your Honor.

THE COURT: You're just going to say these were the professional fees incurred and you're going to argue to the jury that they were unnecessary?

MS. ANDREW: Well, I guess I would take a step back and I would say we are relying on Greenberg as to causation, so to the fact that he has an opinion that the process took too long and was unnecessarily delayed and prolonged, to the extent that that is a necessary predicate to say some of the fees were unnecessary, then, yes, we are relying on him for that. But we're not relying on him for any calculation of that or any identification of which part of the fees were excessive.

THE COURT: Is his opinion reflected in his 25-page report to the effect that the process went on too long and, therefore, any professional fees incurred were unnecessary?

MS. ANDREW: His report does discuss that the process went on too long.

THE COURT: And does he opine that the expenses incurred for professionals were therefore unnecessary?

MS. ANDREW: He does in that last paragraph.

THE COURT: He does?

MS. ANDREW: Yes.

THE COURT: This isn't crucial, but I don't really get it. Are you relying on a number that came out of the

bankruptcy court that you all actually challenged the reliability of in those proceedings?

MS. ANDREW: We did. We did challenge -- well, we were attempting to challenge it. We never got to a hearing on that, so we never presented the Periculum witness as a witness. His report was filed in anticipation of the hearing.

THE COURT: Well, how can you represent to this Court that this is a reliable figure when previously you've been attacking its reliability in the same or related litigation?

MS. ANDREW: Because it turned -- at the point that the court confirmed the plan of reorganization, it changed from parties opining about what the company might be worth going forward to the court, through the bankruptcy process, actually determining this is what the company is worth. This is no longer a speculation. This is it. This is what you're getting out of this company. You're getting -- the secured lenders are getting $31 million of their loans and trade vendors are getting paid to continue to be trade vendors, and no one else is getting anything. It became a fact. It became what actually happened as opposed to CRG and Periculum debating what should happen. It became fact.

THE COURT: So what's the number?

MS. ANDREW: So we lost. Our guy that we were putting forth lost.

THE COURT: So what's the number, the fact that came

out of the bankruptcy proceedings as to the valuation of the company?

MS. ANDREW: The fact is that the company was worth $31 million, and then potentially you could put some value on the preferred equity that the secured lenders took out of that as well. It turned out to not be worth anything, but in the plan of reorganization, that preferred equity was valid at 11 million.

So if you accept that valuation, then the company was worth 42 million at the time that it -- that the plan of reorganization was accepted.

THE COURT: So then we go 54 minus 42 to for damages, except that the 54 might be higher, it could be any number?

MS. ANDREW: Correct, Your Honor.

THE COURT: You're presenting a damages claim where you don't know the top number? It could be anything?

MS. ANDREW: Well, no, I wouldn't agree it could be anything.

THE COURT: What are your damages?

MS. ANDREW: Our damages are what you just described, 54 minus 42 million and, potentially, if a jury believes, based on the evidence, that there would have been competitive bidding in a bankruptcy, some amount higher than that, but it is not going to, you know, double.

THE COURT: Higher than what, 42?

MS. ANDREW: That it could have sold at higher than 54 in an auction in May of 2008.

THE COURT: I understand your argument. You've addressed my fundamental primary questions. If there's other stuff you want to argue, go ahead.

MS. ANDREW: Thank you, Your Honor.

I just want to briefly touch on a few things that you raised before there was a discussion between you and Mr. Scheier about Mr. Greenberg's experience, relevant experience.

We have set forth in our brief why we believe he's qualified to discuss these market expressions of interest and sales process of a distressed company. He has quite a bit of experience in those areas. He does have quite a bit of Section 363 sales experience as well.

In fact, the case that he refers to on page four of his report, the one case where he's served as an expert witness in the last four years, In re Beria Christian stores, a bankruptcy case, that was a Section 363 sale case. The defendants didn't ask him about that, but it is right there. He also had quite a bit of other experience that they didn't go into at his deposition.

THE COURT: It's your burden to establish his expertise, is it not?

MS. ANDREW: It is, Your Honor, and we have. He

summarized in his report his expertise.

THE COURT: Where does he say anything about 363 experience?

MS. ANDREW: Well, for one thing he refers to the case that he was an expert witness in he refers -- I'm sorry.

THE COURT: Am I supposed to infer from that, oh, that must be a 363 case? Aren't you supposed to tell me that?

MS. ANDREW: Well, with all due respect, Your Honor --

THE COURT: Right.

MS. ANDREW: -- I don't have to list every fact about that case in the report.

THE COURT: Well, what it says here, it is his experience. He's worked as an expert in one bankruptcy case in the last four years. How am I to use that to determine whether he has adequate 363 experience?

MS. ANDREW: It also says in the paragraph preceding that the firm, which consists of only three people, acts as investment banker in Section 363 sales under Chapter 11 bankruptcy. And these are all the subject; that's what an expert deposition is for, to explore the background.

THE COURT: An expert report is for the purpose of establishing the expertise of the person you promote. I understand your position on the 363. I mean, this is an experienced guy who has seen a lot of deals, I get that.

MS. ANDREW: Mr. Scheier also stated that there was

absolutely no evidence in the record regarding the Whitney offer and the likelihood that it would have closed, and there is testimony, at the very least, from Mr. Spencer who was the Houlihan representative, in his deposition at page 101, that Whitney was ready, willing and able to close the transaction.

THE COURT: How does he have the basis to say that?

MS. ANDREW: Because he had worked with them for months on developing a process and testing their viability as a purchaser.

THE COURT: Okay. What else does Mr. Scheier say that set you off?

MS. ANDREW: Well, the discussion that we can't claim that our damages are uncertain because of the acts of the defendants, because we could have deposed J.H. Whitney and eliminated all uncertainty. Well, with all due respect to Mr. Scheier, deposing J.H. Whitney would not have taken away the uncertainty because they were ready, willing and able. We could have taken their deposition and they could have said that, but there was still actions by the company that prevented the auction from going forward. And so that's what created the uncertainty.

We can't know, would -- if it's three or four weeks passing, would that have actually happened and at what price, because the process was shut off when the board was removed and by the Morgans, and they declined to pursue that opportunity.

That's what creates the uncertainty, not the lack of testimony.

THE COURT: I wrote down defendants' conduct created the uncertainty. That's your argument?

MS. ANDREW: That's my argument, yes, Your Honor. Thank you.

THE COURT: Okay.

MS. ANDREW: Just a couple other quick points. I think I've already made clear from my answers to your questions that we are not abandoning Mr. Greenberg as our damages expert, as the defendants have said in their reply brief. I said that I already addressed that.

The defendants rely on essentially two cases for their proposition that if the Court finds that our expert is unreliable and throws out his opinion as to damages, we are not permitted to use any other evidence of damages, and those two cases are the ones that you identified, *Info-Hold* and *Cole*.

And the *Info-Hold*, our understanding of that, from reading the published opinion, is that there was no other evidence in the record on damages beyond the expert report. And so once the expert report was thrown out, there was nothing that the defendants -- that the plaintiffs could put forward.

This is not that case because we have quite a bit of factual evidence that's in the record that other witnesses will testify to regarding the underlying facts as to the declining value of the company and the different expressions of interest

over time.

So we believe that this is not an *Info-Hold*. And this is also not *Cole* because in *Cole* what happened was once the court -- once the defendants filed their motion to exclude the expert, the plaintiffs then filed affidavits and errata sheets to their deposition testimony trying to add new facts to the record that contradicted their prior positions.

We're not adding new facts. We're pointing the Court to facts that are already in the record. Some of the facts were developed by different defendants in their depositions of witnesses. So the facts are all out there. And they're not new facts. They're not facts we're trying to create by a self-serving affidavit.

THE COURT: So *Info-Hold* is not necessarily wrongly decided, it is just distinguishable?

MS. ANDREW: Exactly, Your Honor.

THE COURT: Very well.

Did you get that?

MS. ANDREW: And then finally, to one of your last questions of Mr. Scheier, if you were to hold that our expert could not opine on damages and we could not offer any other factual evidence of damages, that would, of all of the pending motions for summary judgment, that would only relate to the ones that go to Count 6 and Count 8 on the sale process.

Count 3 goes to Condor. Mr. Greenberg's report is not

relevant to that.

Count 4 is the Levimo transaction, and that's not affected.

The preference claims, which is Count 11, I believe, and the claim -- the motion for summary judgment of the Morgan Trust on equitable subordination. So it would not resolve all of the pending motions.

THE COURT: Very well.

MS. ANDREW: And if you have no further questions, then that's all I have.

THE COURT: Was Greenberg hired as an expert witness to opine on causation of loss of value?

MS. ANDREW: Yes.

THE COURT: Or damages?

MS. ANDREW: Both, Your Honor.

THE COURT: And he states in his report that, I'm going to give opinions on causation and damages?

MS. ANDREW: Yes.

THE COURT: Very well. Actually, oral argument has been really helpful to me. Thank you.

MS. ANDREW: Thank you, Your Honor.

THE COURT: Did you reserve time for rebuttal?

MR. SCHEIER: I believe I did, Your Honor.

THE COURT: I don't recall that.

MR. SCHEIER: It was in that little bit of fat I built

in with my percentage.

THE COURT: The fat is gone.

MR. SCHEIER: I'm at your --

THE COURT: You feel compelled to reply?

I love to ask lawyers that. They all say yes.

MR. SCHEIER: I don't feel compelled. I believe it might be useful.

THE COURT: Five minutes or less.

MR. SCHEIER: Okay.

THE COURT: Mr. Muething, put it on your watch.

MR. MUETHING: Yes, Your Honor.

MR. SCHEIER: Your Honor, the broadest response is, since I only have up to five minutes is that --

THE COURT: Because you took 50.

MR. SCHEIER: No, I recognize that, Your Honor.

-- is that I didn't hear any response to how the evidence its going to come in over hearsay objections. As Ms. Andrew was speaking, I looked at the hearsay rules and there's no exception that says it's not hearsay if people acted in conformance with what was supposedly said, so I don't think that -- and that was the best answer I heard.

THE COURT: That's on the 54 million?

MR. SCHEIER: That's on the 54 million. On the other side of the transaction, I got to tell you, another ghost, another aberration appeared. It had to do with secured

creditor debt and preferred stock value. I have read dozens of times through the opposition brief, I have lived this case for five years. I have never heard that before, ever.

THE COURT: I had a sense you had been living this case for five years.

MR. SCHEIER: First time I heard anything about the value secured, the secured debt, which was a settlement. There was some settlement with the secured creditors. Somewhere that settlement now is morphed into an indication of enterprise value of the company or the fair market value of the company? And in terms of the fair market value of the company, it is the first time I'm ever hearing that in the case, and that's what is astounding.

The interrogatories and their expert talk about enterprise value. Now Ms. Andrews stands up and talks about fair market value and talks about negotiated settlement figures in the bankruptcy as being indications of value.

I encourage you and invite you to read Mr. Greenberg's report as frequently as you want. Nothing of the sort is in there. He relies on the CRG number in the disclosure statement.

And by the way, the bankruptcy court did not adopt that number. That number was in a disclosure statement, a disclosure statement that says, this shall not be used as indications of any expression of market value of the company,

and its purpose was solely to solicit votes on a plan. It didn't go to the court. It wasn't anything that the court needed to pay attention to, other than were the disclosures accurate. There were no objections to the disclosures, so the court approved the use of that disclosure statement to send to the various creditors' constituencies who could then read it and say: Do you want to vote in favor or reject the plan?

THE COURT: And that's the CRG number?

MR. SCHEIER: That's the CRG number, and that's the only place it appeared. At the end of the day, the court really confirmed the consensual -- not really that the court confirmed the consensual plan, all of the creditors, unsecured and otherwise, including Mr. Miller's client, agreed on numbers.

The court didn't have to do any work. The court never scrubbed the $31 million. The court never adopted it. The court had a consensual plan. All objections to the plan were dropped and that's why we never saw the Periculum report ever admitted into evidence, but it certainly was served as a proposed exhibit, if there was going to be a contested confirmation hearing, which there wasn't.

So, again, I've heard opposing counsel's argument here and they seem to be now running at high speed from the CRG number and talk about secured debt and preferred stock values. I never heard those things before, and that's the pickle I'm

in.

THE COURT: You heard the Order of Confirmation of the bankruptcy court? That's admissible.

MR. SCHEIER: You know something? I never researched it because it was never briefed and, again, more ghosts, more aberrations. I'm never able to understand what their case is. What I know is I know what their expert told me, and that is that he pulled the 31 to 38 million-dollar enterprise value out of the disclosure statement. And I then dutifully cross-examined him on that, and the result of that cross-examination is in the transcript and in our brief.

He never mentioned anything about anything other than that being in the disclosure statement. I don't know whether they confirmed -- the order confirming the plan is admissible, nor do I think that it is relevant.

Okay. It is confirming. It is confirming a consensual plan. There was no evidence taken, there are no supporting findings of fact and conclusions of law, even assuming those would be admissible, against my clients in this case.

THE COURT: Aren't all sales consensual agreements?

MR. SCHEIER: Not all. All confirmed bankruptcy plans are not by consensual agreement. What was by way of consensual agreements was the fact that this plan was confirmed. The bankruptcy court didn't have to hear testimony and didn't take

testimony as to the value of the company.

THE COURT: Very well. How is he doing, Mr. Muething?

MR. MUETHING: He has about a minute left.

MR. SCHEIER: Yeah, well, grant our motion. How is that?

You know, Judge, just -- I'll close by saying I didn't really hear any response as to how that stuff gets into evidence. And I will respect the time restriction, but much of what I heard today, for example, by the various offers -- and you talk about the upper end. I still don't know what the upper end of the damages calculation is. And the speculation that there are other, quote, unquote, bidders, no such thing in the record.

Anyway, we briefed the rest of the points. Thank you so much for your time. I'm here to answer your questions if you have any; otherwise, I'll be happy to take my seat.

THE COURT: Did you get Mr. Muething's notes and have you addressed those?

MR. SCHEIER: You know, basically my entire arguments are derived from Mr. Muething's notes so --

THE COURT: That's my understanding.

MR. SCHEIER: So, long ago I picked up on -- identified the brains behind the operation, and it's no different here today.

He did apparently want to me to point out that we

cited the *Hickman* case at page eleven of our reply brief indicating that that court rejected the use of a liquidation analysis in a disclosure statement as an established fact, and then entering judgment because the debtor could not carry their burden they sought to establish through the disclosure statement. It is rank hearsay, Your Honor. That's the bottom line.

MR. MUETHING: As an officer of the court, I have to tell him he's used his time.

THE COURT: Thank you Mr. Muething. I've always thought highly of you.

MR. SCHEIER: As my partner, I wonder if that comports to his judiciary duty to me, but that's another day.

Thank you, Judge. Appreciate the time very much.

THE COURT: Very well. Well, oral argument was helpful to me. We'll move expeditiously on it, and I believe that concludes what we can do.

The Court prepares to recess.

(The proceedings concluded at 5: 40 p.m.)

- - -

C E R T I F I C A T E

I, Jodie D. Perkins, RMR, CRR, the undersigned, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Jodie D. Perkins
Jodie D. Perkins, RMR, CRR
Official Court Reporter